UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

		Filed: 2/18/92
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No.: 92-10273H
	)	
v.	)	Judge Harrington
	)	
MASSACHUSETTS ALLERGY SOCIETY, INC.;	)	
WILFRED N. BEAUCHER;	)	
JACK E. FARNHAM;	)	
BERNARD A. BERMAN; and	)	
IRVING W. BAILIT,	)	
	)	
Defendants.	)	

AMENDED COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On February 3, 1992, the United States filed a civil antitrust Complaint alleging that the defendants named above and their co-conspirators conspired unreasonably to fix and raise the fees paid for allergy services by certain health maintenance organizations ("HMOs") in Massachusetts in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint alleges that, beginning at least as early as October 1984 and continuing at least until the date of the Complaint, defendants and their co-conspirators violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing to have defendant Massachusetts Allergy Society, Inc. ("MAS") act as their joint negotiating agent to obtain higher fees from certain HMOs for allergy services and to resist competitive pressures to discount fees, and to develop and adopt a fee schedule to be used by defendant MAS in negotiating higher fees on their behalf from certain HMOs. According to the Complaint, the effects of the conspiracy have been to unreasonably restrain price competition among defendants for the sale of their services to certain HMOs in Massachusetts, to artificially increase fees for allergy services provided to members of certain HMOs in Massachusetts, and to deprive certain HMOs in Massachusetts of the benefit of free and open competition in the sale of allergy services.

The relief sought in the Complaint is to enjoin defendants for a period of 10 years from continuing or renewing the conspiracy or from engaging in any other conspiracy or arrangement having a similar purpose or effect. The Complaint also seeks to require MAS to institute a compliance program to ensure that MAS does not enter into or participate in any plan, program or other arrangement having the purpose or effect of continuing or renewing the conspiracy.

Entry of the proposed Final Judgment will terminate the action with respect to the consenting defendants, except that the Court will retain jurisdiction over the matter for further proceedings which may be required to interpret, enforce or modify the Judgment, or to punish violations of any of its provisions.

II.

DESCRIPTION OF THE PRACTICES INVOLVED IN THE ALLEGED VIOLATION

At trial, the Government would have contended the following:

1. An HMO is an entity that, for a set premium, provides comprehensive health care services to its members through designated providers who contract with the HMO.

2. In 1988, approximately 20 HMOs provided health care services to approximately 1.3 million people in Massachusetts.

3. HMOs in Massachusetts often provide allergy services to their members by contracting with independent, private practice physicians who specialize in the treatment of allergies ("allergists"). HMOs typically pay these allergists according to fee schedules set by the HMO. These fee schedules frequently represent a discount from the physicians' usual charges.

4. MAS was founded in 1977 and is a not-for-profit membership corporation organized and existing under the laws of the Commonwealth of Massachusetts. MAS is a professional association of about 55 allergists. Most of the allergists

practicing in Massachusetts are members of MAS and compete with each other for both private-pay patients and the opportunity to provide service to HMO members.

5. Wilfred N. Beaucher, M.D. ("Beaucher") is an allergist licensed to practice medicine in Massachusetts and is in private practice. Beaucher since October 1984 has been the official MAS representative to negotiate fees with HMOs and served as Chairman of the MAS HMO Liaison Committee from its inception in September 1986.

6. Jack E. Farnham, M.D. ("Farnham") is an allergist licensed to practice medicine in Massachusetts and is in private practice. Farnham was Secretary-Treasurer of MAS from June 1984 to June 1986 and President of MAS from June 1986 to June 1988. Farnham served as an ex-officio member of the MAS HMO Liaison Committee from September 1986 until at least June 1988.

7. Bernard A. Berman, M.D. ("Berman") is an allergist licensed to practice medicine in Massachusetts and is in private practice. Berman is a founder of MAS and served as a member of the MAS HMO Liaison Committee from its inception in September 1986.

8. Irving W. Bailit, M.D. ("Bailit") is an allergist and is licensed to practice medicine in Massachusetts. Bailit is a former president of MAS and served as a member of the MAS HMO Liaison Committee from its inception in September 1986.

9. Defendants Beaucher, Farnham, Berman, and Bailit each provide allergy services to members of one or more HMOs in Massachusetts.

10. Beginning at least as early as October 1984, defendants and some other MAS members agreed to use MAS as a joint negotiating agent to obtain higher fees from certain HMOs for allergy services and resist competitive pressures to discount fees.

11. On or about October 2, 1984, Beaucher was appointed as the official representative of MAS to negotiate higher fees from HMOs for allergy services on behalf of the individual defendants and other MAS members, and on subsequent dates Beaucher's appointment was reconfirmed.

12. On or about September 16, 1986, the MAS HMO Liaison Committee was created and Berman, Bailit and another allergist were appointed to that Committee to assist Beaucher in negotiating higher fees from certain HMOs for allergy services.

13. On or before December 3, 1986, defendants and some other MAS members agreed to develop and use a fee schedule in negotiating higher fees from certain HMOs for allergy services and agreed that MAS members would take a uniform position on the prices to be sought from these HMOs.

14. On or about December 31, 1986, MAS submitted a fee schedule to an HMO on behalf of MAS for the purpose of negotiating higher fees for allergy services from that HMO for the individual defendants and other MAS members.

15. On or about May 29, 1987, Beaucher submitted a revised fee schedule to the same HMO on behalf of MAS and pressured the HMO to raise its allergy fees to the level specified in the schedule.

16. On or before August 6, 1987, MAS agreed with that HMO on the fees to be paid by the HMO for allergy services.

17. On or about August 19, 1987, Berman submitted a fee schedule, on behalf of MAS, to another HMO for the purpose of negotiating higher fees for allergy services from that HMO.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission by either party with respect to any issue of fact or law.

Under the provisions of Section 2(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section XVIII of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that defendant MAS does not act for and is not used by allergists as a joint negotiating agent on fees with any HMO.

A. Prohibitions and Obligations

Under Section IV(A) of the proposed Final Judgment, MAS is enjoined from entering into, negotiating, or attempting to enter into any agreement or understanding concerning any fee, either on its own behalf or as a representative of any physician, with any third party payer. "Fee" is defined in Section II of the Final Judgment as "any proposed, suggested, recommended, or actual charge, capitation rate, reimbursement rate, relative value conversion factor, relative value unit, or price term or condition for any allergy or allergy-related service or any methodology for determining or computing any of the foregoing." "Third party payer" is defined in Section II of the Final Judgment as "any person or entity that reimburses for, purchases, or pays for health care services provided to any other person and includes, but is not limited to, health maintenance organizations, preferred provider organizations, health insurance companies, prepaid hospital, medical, or other health service plans such as Blue Shield and Blue Cross plans, government health benefits programs, administrators of self-insured health benefits programs, and employers or other entities providing self-insured health benefits programs."

Section IV(B) enjoins MAS from providing recommendations to any physician on the desirability or appropriateness of any fee paid or to be paid by any third party payer. Section IV(B)

states, however, that (1) nothing in Section IV(B) prohibits MAS from engaging in the conduct permitted by Section IV(C), and (2) nothing in the Final Judgment prohibits MAS when requested by a third party payer or patient from participating in peer review of fees charged by individual physicians in individual cases. "Peer review" is defined in Section II of the Final Judgment as "an examination of a physician's charges in a particular case and an assessment of whether those charges were excessive."

Section IV(C) enjoins MAS from developing, adopting or distributing any fee schedule or relative value scale for any use with any third party payer, including use in negotiating or attempting to enter into an agreement or understanding with a third party payer, with one exception. Under the Final Judgment, MAS may suggest or provide a fee schedule or relative value scale to a third party payer solely for informational purposes if (a) the third party payer initiates in writing a specific request to MAS for that information, and (b) MAS, at the time of transmitting the fee schedule or relative value scale to the third party payer, expressly states in writing that the payer is not required to accept or adopt the fee schedule or relative value scale. "Fee schedule" is defined in Section II of the Final Judgment as "any list of physician services showing a fee, range of fees, or methodology for determining or computing fees for such services." "Relative value scale" is defined in Section II of the Final Judgment as "any list or compilation of medical services or

procedures that sets comparative values for such procedures or services whether or not those values are expressed in or convertible to monetary terms." Section IV(C) further states that nothing in the Final Judgment prohibits MAS from considering or developing any other type of fee information for use by a third party payer, or from actually suggesting or providing such fee information to a third party payer provided MAS, at the time of the transmission, expressly states that the payer is not required to accept or adopt the information.

Under Section IV(D), MAS is enjoined from advocating or recommending that any physician withdraw from or refuse to enter into, or threaten to withdraw from or refuse to enter into, any actual or proposed agreement with any third party payer. MAS is also prohibited under Section IV(E) from communicating to any third party payer that any physician will or may withdraw from or refuse to enter into any actual or proposed agreement with any third party payer if any term or condition is not acceptable to MAS or to any physician.

Under Section V, each individual defendant is enjoined, except as provided in Section VI, from (1) discussing any fee with or submitting any fee to any third party payer on behalf of MAS or as an agent for any other physician; (2) agreeing or attempting to agree with MAS or any other physician on any fee; and (3) agreeing or attempting to agree with MAS or any other physician to withdraw from or refuse to enter into, or threaten

to withdraw from or refuse to enter into, any actual or proposed agreement with any third party payer.

Section VI provides that nothing in the Final Judgment prohibits an individual defendant from continuing to be or becoming a member or employee of a partnership, professional corporation, or other bona fide group practice, or, on behalf of any such entity, from negotiating any fee or withdrawing from or refusing to enter into or stating an intention to withdraw from or refuse to enter into any actual or proposed agreement with any third party payer. Section VI also provides that nothing in the Final Judgment prohibits an individual defendant from continuing to be or becoming a member of an integrated joint venture before or after the entry of the Final Judgment so long as the integrated joint venture in no way discourages or prohibits any participating physician from negotiating or contracting independently with any third party payer. "Integrated joint venture" is defined in Section II of the Final Judgment as "a joint arrangement to provide prepaid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services." Under Section VI, an individual defendant must promptly inform plaintiff of the name and address of any

integrated joint venture he joins after the entry of this Final Judgment.

Section VII provides that nothing in the Final Judgment prohibits any defendant acting either alone or with others from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency, legislative body or other governmental agency concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding.

Section VIII provides that each individual defendant is enjoined from holding any office in MAS for the next five years or serving on any committee of MAS that provides any information on fees to third party payers.

Section IX requires MAS to maintain an antitrust compliance program. Section IX provides that this program at a minimum shall include (1) establishing, adopting, and maintaining a written statement setting forth the policy of MAS regarding compliance with the antitrust laws and this Final Judgment; (2) distributing by certified mail, return receipt requested, within 60 days from the entry of this Final Judgment, a copy of this policy statement and the Final Judgment, Complaint, and Competitive Impact Statement in this matter to each member of MAS; (3) providing a copy of the policy statement and the Final Judgment, Complaint,

and Competitive Impact Statement in this matter to each person joining MAS within 60 days of that person joining MAS; (4) holding a briefing annually at a general membership meeting on the meaning and requirements of the Final Judgment and the antitrust laws; (5) obtaining from each MAS officer and Executive Committee member an annual written certification that he or she (a) has read, understands, and agrees to abide by the terms of the Final Judgment, (b) has been advised and understands that noncompliance with the Final Judgment may result in his or her conviction for criminal contempt of court and imprisonment and/or fine, and (c) is not aware of any violation of the Final Judgment; (6) maintaining for inspection by plaintiff a record of recipients to whom the Final Judgment has been distributed and from whom the required certification has been obtained; and (7) conducting an audit of its activities within 60 days from the entry of the Final Judgment and periodically thereafter while the Final Judgment remains in effect, to determine compliance with the Final Judgment.

Section X requires each individual defendant to distribute a copy of the Final Judgment to each physician in, and the business and office managers of, their respective practices within 10 days of the entry of the Final Judgment. Section X also requires each individual defendant to distribute a copy of the Final Judgment to any physician who joins their respective practices or to any person who becomes the business or office manager of their

respective practices within 10 days of that person joining or becoming employed by the practice.

Section XI requires various certifications of defendants. Section XI requires MAS to certify to plaintiff within 75 days after the entry of the Final Judgment that MAS has established and adopted a written antitrust compliance policy and provide a copy thereof to plaintiff; and that MAS has made the distribution of the policy statement and Final Judgment, Complaint, and Competitive Impact Statement in this matter as required by Sections IX(A)-(B) of the Final Judgment. Under Section XI, MAS must also certify annually to plaintiff whether MAS has complied with the provisions of Sections IX(C)-(G). Section XI also requires each individual defendant to certify annually using the form attached to the Final Judgment that defendant has read the Final Judgment and understands it and has complied with Section X of the Final Judgment.

Section XII of the proposed Final Judgment provides that the Court may, after notice and hearing, impose upon MAS a civil fine for violating Section IV of the Final Judgment without there having to be any showing of willfulness or intent. Section XIII of the proposed Final Judgment provides that, in addition to or in lieu of the civil penalties provided for in Section XII of the Final Judgment, the United States may seek and the Court may impose against any defendant or any person any other relief allowed by law for violation of the Final Judgment.

Section XVI requires defendants to provide various notifications to plaintiff. Under Section XVI, MAS must notify plaintiff at least 30 days before any proposed change in its legal structure such as dissolution, reorganization, or merger resulting in the creation of a successor corporation or association, or any other change which may affect compliance with the Final Judgment. Section XVI also requires each individual defendant to notify, in writing, plaintiff not later than 15 days after the retirement of his license to practice medicine or his assumption of inactive status, and to provide plaintiff with evidence of such retirement or assumption of inactive status. In the event that the retiring or inactive individual defendant subsequently seeks reinstatement of his license or resumes active status, Section XVI requires him to notify plaintiff, in writing, not later than 15 days after such reinstatement or resumption of active status.

B. Scope of the Proposed Final Judgment

The Final Judgment applies to MAS and to each of its officers, committee members, agents, employees, successors, and assigns, to each individual defendant until the retirement of his license to practice medicine or the assumption of inactive status as provided in 243 CMR 2.06(3) and 243 CMR 2.07(7) and during any subsequent period of reinstatement of his license or resumption of active practice, and to each of their agents and employees, and to all other persons acting in concert or participation with any of them

who receive actual notice of this Final Judgment by personal service or otherwise.

Section XVII of the proposed Final Judgment provides that the Final Judgment shall remain in effect for 10 years.

C. Effect of the Proposed Judgment on Competition

The relief in the proposed Final Judgment is designed to ensure that MAS does not act for and is not used by allergists as a joint negotiating agent on fees with any HMO. The relief is also designed to ensure that the individual defendants do not negotiate fees on behalf of MAS or, except in very limited circumstances, as an agent for any other physician with any third party payer.

Three separate methods for determining compliance with the terms of the Final Judgment are provided. First, Section XI(A) requires MAS to certify to the Department of Justice within 75 days after the Final Judgment is entered that MAS has established and adopted a written antitrust compliance policy, provided a copy to plaintiff, and made the required distribution of the statement and Complaint and Competitive Impact Statement under Sections IX(A)-(B) of the Final Judgment. Section XI(B) requires MAS to certify annually to the Department of Justice that it has made the various distributions, held the briefings, obtained the certifications, maintained the records, and conducted the audits required by Sections IX(C)-(G) of the Final Judgment. Section XI(C) requires each individual defendant to certify annually using the form attached to the Final Judgment that he has read

the Final Judgment and understands it and has complied with Section X of the Final Judgment.

Second, Section XIV(A) provides that, upon reasonable notice, the Department of Justice shall be given access to any records of a defendant and be permitted to interview any officers, employees, or agents of such defendant.

Finally, Section XIV(B) provides that, upon written request, the Department of Justice may require a defendant to submit written reports, under oath if asked, about any matters relating to the Final Judgment as may be requested.

The Department of Justice believes that this proposed Final Judgment contains adequate provisions to prevent further violations of the type upon which the Complaint is based and to remedy the effects of the alleged conspiracy.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C.

§ 16(a), the judgment has no prima facie effect in any subsequent lawsuits that may be brought against defendants in this matter.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Robert E. Bloch, Chief, Professions and Intellectual Property Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W., Washington, D.C. 20001, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed judgment at any time prior to entry. Section XV of the proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial of the case with respect to the consenting defendants. In

the view of the Department of Justice, such a trial would involve substantial cost to the United States and is not warranted since the proposed Final Judgment provides all the relief that the United States sought in its Complaint.

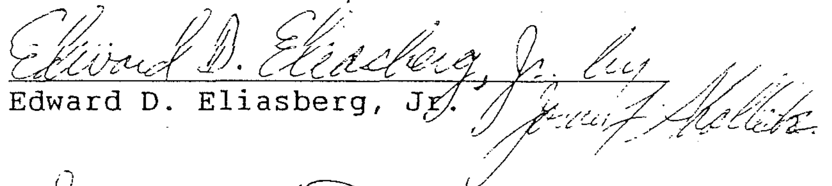
VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

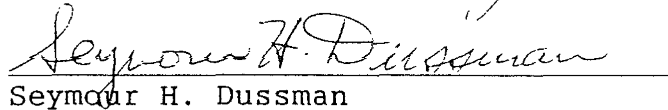
No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment.

Dated: FEB. 14, 1992.

Respectfully submitted,



Edward D. Eliasberg, Jr.



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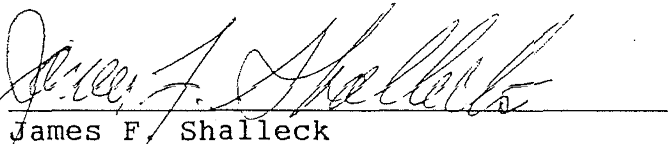
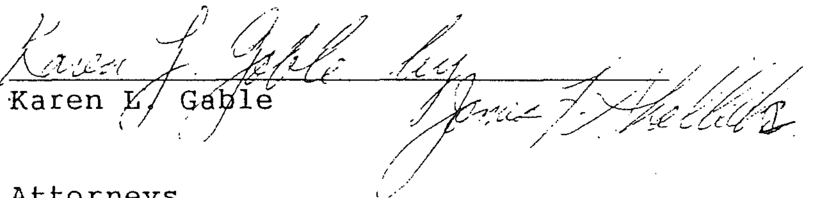


James F. Shalleck



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CERTIFICATE OF SERVICE

I, James F. Shalleck, hereby certify that a copy of the Amended Competitive Impact Statement in United States v. Massachusetts Allergy Society, Inc., et al. was served on the 14th day of February 1992, first class mail, to counsel as follows:

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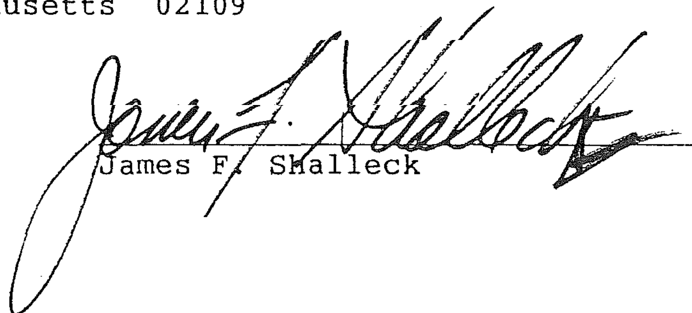

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